

QUÉBEC

AMERINDIANS AND INUIT OF QUÉBEC

INTERIM GUIDE FOR CONSULTING
THE ABORIGINAL COMMUNITIES

UPDATED IN 2008



Interministerial Support Group on Aboriginal Consultation

Ministère des Affaires municipales et des Régions

Ministère du Développement durable, de l'Environnement et des Parcs

Ministère de la Justice du Québec

Ministère des Ressources naturelles et de la Faune

Ministère des Transports du Québec

Secrétariat aux affaires autochtones

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INTRODUCTION

In recent years, various Aboriginal communities have shown a growing interest in taking part, in numerous ways, in economic development projects.

Reckoning that they should be consulted and accommodated for all projects that affect their interests and their rights on the territories to which they have laid claim, the Aboriginal communities have alternately requested changes, financial compensation, jobs or the outright cancellation of projects or activities deemed detrimental to the preservation of the rights which they have asserted.

These requests are based on the recent evolution of jurisprudence in the field of Aboriginal law. Mention may be made of the rulings in the *Haida Nation v. British Columbia (Minister of Forests)*¹ and *Taku River Tlignit First Nation v. British Columbia (Project Assessment Director)* cases², handed down by the Supreme Court of Canada on November 18, 2004 and which concern the Crown's duty to consult and accommodate the Aboriginal people, as well as the decision in the *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* case³ rendered on November 24, 2005. As we will see, these decisions set new requirements in the field of Aboriginal law.

Over the years, several government departments, agencies and corporations have developed Aboriginal community consultation practices. The aim of this guide is to define more clearly the guidelines set forth by the Supreme Court of Canada on this subject. First developed by the interministerial support group set up in the summer of 2005, at the request of the Cabinet, the guide was updated in 2008, in the wake of the tour made by Mr. Jules Brière, lawyer, in 2006-2007 of certain Aboriginal communities. The purpose of this tour was to find out the concerns of these communities about government practices in the consultation field and to obtain their comments on the content of the first version of the guide.

1. [[2004] 3 S.C.R. 511, hereinafter referred to as the "Haida ruling".

2. [2004] 3 S.C.R. 550, hereinafter referred to as the "Taku River ruling".

3. [2005] 3 S.C.R. 388.

1

OBJECTIVES

In the matter of consultation of the Aboriginal communities, the guide proposes guideposts intended for the various government departments and agencies⁴ whose activities could infringe certain Aboriginal rights claimed by the Aboriginal communities, without these rights having necessarily been defined or proven.

More concretely, the document provides general guidelines, the purpose of which is to make more operational the constitutional duty incumbent upon the Government of Québec to consult the Aboriginal communities. It also specifies the notion of accommodation which arises, in some cases, from the duty to consult

By setting guideposts for the government's activities, the guide aims to facilitate the reconciliation of the interests of the Québec State and those of Aboriginal communities, while avoiding, wherever possible, compromising the rights and interests claimed in a credible manner by these Aboriginal communities until such time as agreements are reached to specify the scope of their Aboriginal rights and the procedures of the consultation.

Moreover, the government departments and agencies must draw inspiration from the guideposts set by the guide to define their own sectoral guidelines in the consultation field, according to the nature of their activities and their intervention sectors.

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SCOPE

The *Interim Guide for Consulting the Aboriginal Communities* applies to every government department, when an envisaged action can infringe on the rights claimed in a credible manner by one or more Aboriginal communities. However, it does not apply to public agencies which, although they are mandataries of the government for the purposes of their Constituting Act, have a separate legal personality and are not authorized to engage the responsibility of the government. In the case of actions planned by such an entity, it is the government or the lead department – the department to which the agency reports – that remains in charge of the consultation in its capacity as duty bearer. However, it will be advisable to closely associate the entity in question in each stage of the consultation.

The guide applies to activities related to planning and to drafting statutes and regulations, administrative decisions as well as activities ensuing therefrom and that may affect the rights and interests claimed by certain Aboriginal communities, such as the development of the territory and natural resources. The same is true for political commitments and the government policies likely to have such an effect.

It is, however, important to point out that the guide does not seek to settle the question of the recognition of Aboriginal rights or treaty rights for each of the Aboriginal communities or to address more comprehensive elements being discussed with certain communities. These matters will have to be dealt with by resorting to the processes agreed upon, among others, within the context of the comprehensive territorial

4. To make the text easier to read, the word department will also apply to government agencies hereinafter.

negotiations, in which the federal government is a participant. The objective here is to make sure that the rights and interests of the Aboriginal communities are given fair consideration within the current context of government activities.

Given the fact that some of the procedures related to consultation and participation in the management of the territory and resources have been defined on the territory subject to the northern agreements, the degree of consultation ensuing from the *Haida* and *Taku River* rulings may be fairly limited, even non-existent. However, the guide could apply to the signatory nations on the territories contemplated by the James Bay and Northern Québec Agreement as well as by the Northeastern Québec Agreement, insofar as certain potential Aboriginal rights not related to the territory have not been extinguished by the federal statute implementing these agreements.

Finally, the guide will apply when the guideposts that it contains correspond more to an adequate consultation and when they are preferable to the provisions stipulated in certain sectoral agreements signed with the Aboriginal communities prior to the *Haida* and *Taku River* decisions. At the very least, these latter agreements should be re-examined to take these guideposts into account.

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DUTY TO CONSULT

To better grasp the legal grounds underpinning the Crown's duty to consult the Aboriginal communities, a presentation will be made here of the main milestones in the evolution of Aboriginal law in recent decades and more specifically, of the importance of the *Haida* and *Taku River* rulings.

Aboriginal law has developed considerably over the last fifteen years. However, the start of the revolution in this field dates back to the early 1970s when the Supreme Court of Canada ruled, in the *Calder* case, that the existence of the Aboriginal rights of the Aboriginal people did not necessarily depend on the recognition of such rights by the Crown, but rather on the fact that the Aboriginal people were organized in societies occupying the land as their forefathers had done for centuries.

Aboriginal rights span a wide spectrum and are divided into four categories. Generally, an Aboriginal right is an activity that consists of an element of a custom, a practice or a tradition that was an integral part of the distinctive culture of an Aboriginal community prior to the arrival of the Europeans and that has endured. Aboriginal rights are thus associated with activities related to the way of life of the Aboriginal people.

As for the various categories of Aboriginal rights, at one end of the spectrum there are those rights that are not attached to a territory (language, for example). Next come Aboriginal rights exercised by means of activities that are not specific to a territory, followed by Aboriginal rights that are practiced by way of activities that are closely related to a parcel of territory. Hunting, fishing and trapping activities fall under these latter two categories. Finally, at the other end of the spectrum lies Aboriginal title which is the right to the territory itself and which is similar to title of ownership. Aboriginal title includes the right to occupy lands and to use natural resources on an exclusive basis.

The existing Aboriginal rights, whether Aboriginal or treaty rights, are recognized under section 35 of the *Constitution Act, 1982*. Hence, they benefit from constitutional protection. However, these rights, including

Aboriginal title, are not absolute. The Courts have recognized that the Crown can infringe these rights insofar as it can justify its action. Basically, such a justification is made when the Crown succeeds in showing that it acted in such a way as to truly take into account the existence of Aboriginal rights. Consultation may therefore serve as proof of justification.

Evolution of the duty to consult

Prior to the *Haida* and *Taku River* rulings, the concept of the consultation of the First Nations was contained within the analysis framework of section 35 of the *Constitution Act, 1982*. The four components of the analysis framework of section 35 recognized by the Supreme Court of Canada are listed below:

- 1) Has the applicant demonstrated that he was acting pursuant to an Aboriginal right?
- 2) Was this right extinguished prior to the enactment of section 35?
- 3) Has this right been infringed?
- 4) Is the infringement justified?

Aboriginal law prior to the *Haida* and *Taku River* rulings seemed to require that the Aboriginal people have proven their rights, before the Crown had to justify the infringement of these rights. Indeed, it was only at the fourth stage of the aforementioned analysis framework that the Crown could give evidence of a consultation to justify its infringement of an Aboriginal right or a treaty right.

At that time, consultation was certainly an important means, but it was only one means among others allowing the Crown to justify the infringement of an Aboriginal right. More specifically, within the analysis framework of section 35 of the *Constitution Act, 1982*, the justification of the infringement of Aboriginal rights leads to the application of a two-part test. The Crown must first show that it was acting pursuant to a valid legislative objective, such as by reason of public safety, by reason of conservation or for any other compelling and valid reason. Insofar as the conclusion is drawn that a valid legislative objective exists, it is then necessary to examine the second part of the test: the Crown's fiduciary duty when dealing with the Aboriginal people. It is within this context that the Court will examine if, when endeavouring to obtain the desired result, the Crown limited as much as possible the infringement of Aboriginal rights, if financial compensation was paid, and if the Aboriginal people were consulted.

In the *Haida* and *Taku River* rulings handed down on November 18, 2004, the Supreme Court of Canada made, whether explicitly or implicitly, the following findings: 1) the classic recourses of the Aboriginal people before the Courts to obtain recognition of their rights are long and costly; 2) the injunction route is virtually impossible for the Aboriginal people due to the balance of convenience which generally tips in favour of the Crown; 3) comprehensive territorial negotiations are, by definition, a long process; and 4) the agreements concluded on temporary measures are insufficient or unfeasible, such that the territory continues to be developed despite the existence of legal recourses or negotiations pertaining to the claims of the Aboriginal people.

That is why the highest court in Canada in the land ruled, in the *Haida* and *Taku River* cases, that the Crown henceforth had the duty to consult the Aboriginal communities and to address their concerns even before the Aboriginal communities had established the existence of their title on lands as well as their Aboriginal rights. These rulings thus mark a certain break with the principles related to consultation that prevailed in the past.

This duty to consult the Aboriginal communities ensues from the principle of the honour of the Crown. This principle arises when the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or title and contemplates conduct that might adversely affect it. The measures that are likely to adversely affect the rights claimed by the Aboriginal communities concern both development projects requiring State intervention and planning activities pertaining to public lands.

The content of the duty to consult and, under certain circumstances, to accommodate the Aboriginal communities will vary according to the circumstances. The Supreme Court of Canada stipulates that the precise nature of the obligations that arise in various situations will be defined as the courts are called upon to rule on this question. Moreover, the Supreme Court points out that the strength of the case supporting the right and the seriousness of the potentially adverse effects on this right will have consequences on the scope of the Crown's duty.

The Court summarizes the various principles applicable to consultation, including the following:

- Both parties must demonstrate good faith.
- The Crown must have the intention of substantially addressing the concerns of the Aboriginal communities as they are expressed; that is what is expected of honourable conduct.
- True consultations must be held without there being an obligation to reach agreement.
- The Aboriginal communities must not frustrate the efforts made in good faith by the Crown. Nor should they defend unreasonable positions to prevent the Crown from acting in those cases where, despite a true consultation, the parties are unsuccessful in reaching agreement.

The right to be consulted under certain circumstances does not give the Aboriginal communities a veto right over the Crown's decisions.

The Court goes on to explain that the requirements concerning the consultation extend over a spectrum. Where the claim to title is weak, Aboriginal right is limited or the potential for infringement is minor, the only duty of the Crown is to give notice to the interested Aboriginal community, disclosing information and discussing any issues raised by the project. If, on the other hand, a strong prima facie case for the claim is established, where the right and the potential infringement are of high significance to the Aboriginal communities, and the risk of noncompensable damage is high, a deep consultation, aimed at finding a satisfactory interim solution, may be required.

If, following consultation, it appears that the Crown must modify its project, the Supreme Court of Canada considers that an obligation to accommodate may arise. The Supreme Court points out that the Aboriginal communities do not have a veto right, but the interests of both parties must be weighed, and there must be give and take. In the accommodation process there is no duty to agree, but each party must make good faith efforts to understand the other party's concerns and move to address them, as the case may be.

Another important clarification made by the Supreme Court of Canada is that the Crown alone remains legally responsible for the consequences of relations with third parties, relations having an impact on the interests of Aboriginal communities. While the Crown may delegate certain procedural aspects of consultation to third parties, the latter cannot be held responsible for failures related to the duty to consult. In this respect, the Court specifies that governments may establish policies or regulations making it possible to strengthen the consultation process and, in so doing, reduce the grounds for resorting to the Courts by Aboriginal communities.

In the *Mikisew* ruling, the Court confirmed the approach that it had used in *Haida* and *Taku River*. Moreover, it specified that the principle of the honour of the Crown applied to relations between the State and an Aboriginal community, even after a treaty was signed. According to the Court, the honour of the Crown applies both to the interpretation and to the negotiation of a treaty. This principle permeates each treaty and the performance of each of the obligations appearing therein.

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THE CONSULTATION THAT THE CROWN MUST HOLD

Since the honour of the Crown requires that the rights and interests claimed by Aboriginal communities be addressed, departments must consult and, in certain cases, accommodate these communities.

When the question of the consultation of the Aboriginal communities arises, the departments may refer to their Aboriginal Affairs Coordinator. In addition, given the legal consequences of the process described below, departments must seek the advice of their legal division, in collaboration with the Direction du droit autochtone et constitutionnel (Aboriginal and constitutional law directorate) of the Ministère de la Justice. An interministerial support group (the ISG), coordinated by the Secrétariat aux affaires autochtones, will also be at the disposal of departments.

Preliminary analysis

The preliminary analysis must make it possible, on the one hand, to determine if any envisaged action is likely to have an impact on certain rights claimed by an Aboriginal community and, on the other hand, the extent to which the claim of these rights appears credible.

This analysis must be carried out by or in close collaboration with the representatives designated by the department for this purpose, for example the Aboriginal Affairs Coordinator. The department will also endeavour, when the situation lends itself to such action, to establish a collaboration with the Aboriginal communities concerned in order to obtain a better knowledge of the rights that they are claiming and that would be affected on a given territory.

When determining on a preliminary basis whether or not the envisaged action risks infringing a right claimed by an Aboriginal community, the following questions may be useful: Are Aboriginal people present on the territory in question? Is this territory currently the subject of an Aboriginal claim or negotiations with the governments? Are there known or recognized hunting, fishing and trapping rights? What use do the Aboriginal people make of this territory? Will the envisaged action have an impact on the territory, the resources and the activities in progress?

Afterwards, the preliminary analysis will have to focus more specifically on the evaluation of the credibility of the claim that an Aboriginal community submits to the government. Based notably on the expertise developed within the government and the information collected from Aboriginal people, it is possible that following analysis a claim may be considered not credible.

When a claim is considered not credible or when the planned action does not affect an Aboriginal community, a consultation may not be necessary.

In all cases where the preliminary analysis points to an infringement of the rights and interests claimed by one or more Aboriginal communities, we propose parameters that will make it possible to hold an adequate consultation so that this or these communities can specify the nature of the rights that they are claiming along with their interests and so that they can explain the potential infringement of their rights that may result from the carrying out of a project to develop or enhance a territory and its resources. Each department must evaluate the envisaged actions on a case-by-case basis.

The consultation will then be adjusted according to the continuum described in point 3 of this document and following the results obtained at the time of the preliminary analysis. The more the action is likely to have prejudicial effects on the rights and interests claimed in a credible manner, the deeper the consultation will be.

Parameters of an adequate consultation

The following points specify the guideposts for consulting the Aboriginal communities, guideposts on the basis of which the departments will have to develop, with the support of their legal department or their Aboriginal Affairs Coordinator and in conjunction with the Secrétariat aux affaires autochtones, sectoral guidelines in the consultation field that are adapted to their reality, while being in accordance with the guide

Objectives of an adequate consultation

The purpose of the consultation must be to promote, while awaiting the settlement of the claims, the reconciliation of the rights claimed by the Aboriginal communities with the government actions that ensue from the affirmation of the State's sovereignty. To this end, the consultation will have the following objectives:

- Allow the State to provide relevant information concerning the envisaged action (for example, when possible, the scope of the action, the technical parameters, the cost, etc.) and allow the State to specify its interests as well as those of the populations affected, both Aboriginal and non-Aboriginal;
- Allow the Aboriginal communities to explain in a clear and precise manner the nature of their rights and interests in relation to the planned action;
- Allow the Aboriginal communities to explain in a clear and precise manner the impact that the envisaged project will have on their rights and interests;
- Establish, in collaboration with the Aboriginal communities, wherever possible, means making it possible to reconcile the rights and interests of the Aboriginal communities with the planned government action and present the possibilities of accommodation, if any.

Principles that should guide the consultation process

When the time comes for a department to fulfill its obligation to consult the Aboriginal people, the principles of natural justice recognized by administrative law may serve as a guide. As for the consultation of the Aboriginal communities, these principles may be expressed in the following way:

- The consultation must be initiated as far as possible upstream from the decision-making process, notably at the strategic planning stage of the envisaged actions.
- The parties must demonstrate good faith and openness.
- The Crown must hold the consultation with the intention of really taking into account the rights and interests of the Aboriginal communities.

- The Aboriginal communities have the duty to participate in the process and to make known their rights and interests in a precise and clear manner, in relation to the envisaged action.
- The parties have the duty to seek accommodation solutions, as the case may be.
- The parties must agree to the time constraints inherent to carrying out the project or to the legal and regulatory constraints, while granting themselves a reasonable time period so that the consultation is adequate.

Who should be consulted?

The band councils of Aboriginal communities likely to be affected by the envisaged activity must be consulted. Moreover, the consultation may be held with tribal councils or national structures, if the band councils formally mandate them to participate in the consultation.

Québec will have to make sure that it consults all of the communities that are likely, based on the available information, to claim rights that could be affected by the envisaged action. The departments and their units will have to refer to the representatives designated for this purpose, for example the Aboriginal Affairs Coordinator.

Participation of third parties in certain stages of the process

The duty to consult and accommodate Aboriginal communities lies with the Crown. Procedural aspects may be delegated to third parties, for example to project proponents. The latter may also take part in certain stages of the process, in those instances where their presence may be considered necessary for the smooth unfolding of the consultation, among other things, to explain certain more technical aspects of a project. Third parties may also be questioned when deciding on accommodation measures and their implementation.

Interministerial consultation and ministerial responsibility

Some projects giving rise to consultations occasionally require the intervention of several departments during any given stage of the consultation process. In such cases, the departments will have to endeavour to coordinate their action and establish the appropriate contacts with their ministerial counterparts.

Similarly, the departments are responsible for the implementation of the ministerial guidelines established in accordance with the content of the guide, notably with their various units.

Finally, if a department were involved in a process to delegate powers, it would nevertheless retain the obligation to make sure that the duty to consult is respected, which remains the responsibility of the Crown.

Funding

A fund is available at the Secrétariat aux affaires autochtones to support the participation of Aboriginal communities in the consultations that are held by the Government of Québec. The fund allows project-by-project funding or funding according to a more global formula, depending on the context.

Consultation stages

The following stages must allow an adequate consultation that gives tangible expression to the government's desire to truly address the rights and interests of the Aboriginal communities.

First stage: create an adapted consultation process

- Identify the Aboriginal community or communities likely to be affected by the project or the decision, as well as the band council (s) that legally represents them.
- By considering the results of the preliminary analysis, adjust the consultation methods according to the scope of the prejudicial effects of the envisaged action on the rights claimed: exchanges of letters, conference calls, technical meetings, publications, visits to the communities, tours of the sites where the project is planned, etc.
- Agree, when necessary, on precise objectives related to the consultation approach that is beginning and, preferably, with the representatives designated by the band council of the Aboriginal communities concerned.
- Apply an approach that is easy to understand for the band councils and that may have been decided upon with them.
- Consult the band councils separately from the consultation normally applied to all citizens, taking into account the circumstances.
- Clearly explain to the band councils what their role will be, as well as the decision-making process, the timetable and the consultation approach.
- To ensure a valid consultation, provide for an adequate time period allowing the band councils to analyze the information received, to consult the persons who may be directly concerned by the envisaged action and to prepare an adequate response. The time period allocated may be discussed with the Aboriginal communities and vary according to the complexity of the envisaged action, the legal and regulatory constraints, as well as the requirements related to the implementation of the project.
- Plan everything according to a timetable allowing for a certain amount of flexibility.
- Secure the participation of band councils upstream of the decision processes in such a way that it is possible to modify the initial position (the project as it was defined at the outset).
- Envisage the use of techniques adapted to band councils, for example by having the documentation translated into the appropriate language. When the documentation is essential for the smooth unfolding of a consultation, it could be translated into English, if it is intended for Aboriginal communities whose main language or business language is English.
- Considering that the key to a good consultation lies in the exchanging of information that permits a real and constructive participation, the department will have to provide quickly and objectively the necessary information, when it is available, in a clear and understandable language (specification of the envisaged action, the territory concerned, where applicable, and the completion timetable) and provide the available and relevant experts' reports.
- Indicate that there will be a feedback process by specifying that there will be an assessment of the efforts made to take into account the concerns raised regarding the rights and interests presented by the band council(s) concerned.
- Collect and keep each of the steps taken by the department, irrespective of their success.

Second stage: implement the consultation

- Implement the consultation according to what was agreed upon in the first stage: timetable, exchanging of information, respecting the objectives, etc.
- If necessary, validate the content of the information collected from the band councils concerned, when elements appear to be ambiguous, in order to avoid any misunderstandings.

Third stage: analyze the consultation

Two principles must guide the departments' action at the end of the consultation:

- endeavour to understand the concerns formulated by the band councils and try to address these concerns by looking for means to limit, wherever possible, the impact of the envisaged action;
- deploy all necessary efforts in the search for accommodation measures even if, ultimately, there is no obligation to reach agreement with the Aboriginal communities, as these communities have no veto right.

To evaluate if accommodation measures must be sought and, if so, at what level, a department must first analyze the results of the consultation that it held with the Aboriginal communities by way of their respective band council(s). This stage will help determine the envisaged action's degree of infringement of the rights and interests of the Aboriginal communities.

When making this analysis, the following questions may be useful:

- What is the extent of the territory affected by the envisaged action?
- What activities are carried on by the Aboriginal communities?
- To what extent will the activities carried on by the Aboriginal communities be affected? Will this be permanent?
- Will the envisaged action adversely impact access to and utilization of the resources by the Aboriginal communities concerned? If so, to what extent and over how much of the territory?
- Will the envisaged action change or damage the nature of the territory or the availability of resources? If so, to what extent and for how long?
- Does the envisaged action threaten the integrity of heritage sites, for example burial grounds or meeting places?
- Is the envisaged action planned on a territory located near the Indian reserve?
- Does the envisaged action involve the sale of lands to third parties?
- Does the envisaged action involve the issue of long-term leases to third parties? If so, do these leases infringe the rights and interests of Aboriginal communities?

- Are these leases renewable and will they involve other changes to the territory, as well as other extractions of resources?

Depending on the results of the analysis, the department will have to determine if it is necessary and possible to apply accommodation measures in order to mitigate the prejudicial effects of the envisaged action.

5

ADJUSTMENT OF THE ACCOMMODATION

If the analysis of the information gathered during the consultation shows that the Aboriginal communities will not be affected by the envisaged action, accommodation measures will not be necessary. In this case, the department can proceed to the Decision stage described at the end of the document.

If the analysis shows that the envisaged action risks having an impact on the rights and interests of one or more Aboriginal communities, accommodation measures can be negotiated to mitigate, as much as possible and taking into account the circumstances, the disturbance of the rights and interests of the Aboriginal communities caused by the envisaged action, by considering:

- The permanent nature of the effect that the envisaged action may have;
- The extent of the territory affected;
- The level of occupation of the territory by the Aboriginal community;
- The nature of the envisaged intervention.

It is up to the department concerned to apply the accommodation measures adapted to its reality and to evaluate their importance. These measures can take various forms, for example, the modification of a project, the introduction of mitigation measures or the participation of the Aboriginal people in environmental monitoring. What is important is that the accommodation measures mitigate, as much as possible and taking into account the circumstances, the disturbance of the rights and interests of the Aboriginal communities caused by the envisaged action.

In this respect, the payment of financial compensation should not be an automatic reflex or even a means that is favoured to the detriment or exclusion of other accommodation measures. It should only be envisaged when the infringement of the rights and interests of the Aboriginal communities ensuing from a planned government action entails a high degree of seriousness and other measures cannot adequately accommodate the Aboriginal communities concerned.

The departments will have to involve other departments, agencies and public or private corporations interested in the process to develop measures to accommodate the Aboriginal communities and which could be decided upon following the consultations. That way, these other interested parties will be able to better grasp the scope of the envisaged accommodations.

In addition, unless the situation does not allow it, the departments will have to give Aboriginal communities the opportunity to express themselves on the nature and the scope of the accommodation, regarding the rights and interests that can be concerned by the envisaged action.

6

EMERGENCY SITUATIONS

For some specific government activities, it is possible that all of the stages of the consultation as well as the timetables cannot be followed owing to reasons of urgency, for example, related to public safety. In such cases, which must be the exception rather than the rule, reasonable efforts must nevertheless be made to address the rights and interests of the Aboriginal communities and, as the case may be, to accommodate them.

In such circumstances, the Aboriginal community concerned will have to be informed of the reasons justifying the departure from the customary consultation process and, where such is the case, of the special consultation method that applies. The justification of the decision will have to be explained in stage 7.

7

DECISION

As mentioned previously, the consultation practices of departments will have to include an assessment that will record the steps taken for the consultation (letters, meetings, etc.), the description of the concerns expressed by the band council(s) of the Aboriginal communities, the explanation of the decision made by the government or by the empowered minister(s) with respect to these concerns and, as the case may be, the accommodation measures adopted. This assessment will have to be appended, as the case may be, to the brief submitted to the Cabinet.

Finally, when a consultation reveals that the Aboriginal rights and interests may be affected by the envisaged action, the department will then have to convey in writing to the communities concerned the detailed summary of the consultation approach. This summary will have to explain how this consultation was held and what measures have been put forward, where such is the case, to take into account the rights and interests in question or to accommodate the Aboriginal communities.

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